The Polish Counter-Revolution Two and a Half Years Later: Where Are We Today?

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> *"The will of the people is above the law. Law is to serve the people. If it does not it is no longer law."*
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> *Kornel Morawiecki, Honorary Marshall of the Sejm (and father of the Polish Prime Minister)*

> *"Alles, was dem Volke nützt, ist Recht, alles, was ihm schadet, ist Unrecht."*
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> H. Frank, *Nationalsozialistisches Handbuch für Recht und Gesetzgebung*, (1935), p. XIV (quoted from here)

The Polish Constitutional Court is gone. The ordinary courts have been captured. The National Council of the Judiciary brought to the heel and replaced with the loyalists. The state control of the public media and the indoctrination have reached the level of embarrassment. The Supreme Court, as we know it, is now joining the long list of the fallen institutions. The Ombudsman's fate seems to be sealed as one of the fake judges of the "constitutional court" has recently called on and encouraged the majority to capture his office. We are well past mere rubber stamping. It is an incitement to unconstitutional action.

As most recent protests against the purge of the Supreme Court show, the citizens are learning on the fly the meaning of the rule of law, the importance of the independent judiciary and of the separation of powers. However, as they are discovering their collective liberal voice for the first time after 1989, the result of such impromptu civic awakening is anything but certain. The bigger question looms large, one that invites us to step back and look at the Polish constitutional debacle 2015 – 2018 from a distance. Two and a half years after the fateful elections of 2015 there are important lessons to be learnt from the way the democratic backsliding has progressed and the liberal democracy has been overpowered. In order to fully understand the Polish counter-revolution and to appreciate this most recent public awakening, though, we must start by revisiting 1989.

Undemocratic (De)consolidation

As perceptively argued by J. Rupnik, the new elites of the Central and Eastern Europe that emerged from the collapse of the Berlin Wall, thrived by consolidating the democracy without participation and by forming a policy consensus at the expense of politics. Civil society's short-lived constitutional moment of 1989 was soon replaced by the mundane reality of institutional and economic catching-up. Paradoxically, the absence of any social engagement favoured the transition to a market economy. The latter enjoyed the strong and broad social legitimacy of the freedom-starved citizenry, with the democracy being reduced to electoral ritual on the election day with relentless pressure for more market liberalisation in-between the electoral cycles. Democratic rules of the game going beyond the ballot-box were never truly internalized. Rupnik was right when he said that people became used to markets much more readily than they came to embrace democracy.

As a result of this imbalance between liberalisation, markets and civic participation, the liberal institutions created after 1989 always operated against the long shadow cast by the illiberal platforms that never really disappeared. The politics of resentment that engulfed Poland since 2015 realised all this, and understood that nobody would die for a constitutional court (which indeed perished in silence) or courts in general. In 2016 Dawson and Hanley provided a compelling narrative on the vulnerability of the democratic transition post-1989. They warned: „The liberalism of the liberal consensus […] was an elite project driven by small groups at the apex of politics, business, academia and officialdom […] this narrow economic, technocratic variant of liberalism merged with existing illiberal narratives and interests which pro-European elites generally opted to accommodate rather than oppose". Most importantly, as a result of the elitist project, liberal, progressive and rule-of-law-perfect institutions sailed in the sea of illiberal narratives and were only superficially embedded in the public consciousness. They then continued: „Despite appearances in East-Central Europe there is an absence of genuinely liberal platforms – by which we mean a range of mainstream ideologies of both the left and right, based on shared commitments to the norms of political equality, individual liberty, civic tolerance, and the rule of law. As a result, citizens were left unexposed to the philosophical rationales behind liberal-democratic institutions".

As a result, democracy shorn of the civic engagement and liberal platforms was never consolidated. Such an unfinished democratic project on the way towards consolidation was always vulnerable to non-democratic practices. Once the incentive of joining Europe was

gone, the gene of illiberalism and failures of transition resurfaced. The politics of resentment added to all this a crucial legal dimension: the constitutional capture. The process of capturing the state with the avowed objective of winning back the true state for the people was met with acceptance as democratic and liberal consensus proved to be extremely weak and fragile.

The Demand meets the Supply: Emotions Channeled

For a moment, it looked like in 1989 the Poles have turned the corner in their tumultuous, and all to too often tragic history. Common sense and the dream of living in a free European country had triumphed in 1989 and we seemed ready to come together and put our differences and nitpicking aside. This historical wisdom was nowhere better seen than in the concept espoused by the first democratic Prime Minister in Eastern Europe Tadeusz Mazowiecki when he spoke of „the red thick line" drawn between the past and present for the sake of future. We were living a dream of forgiveness, inclusion and building for the future.

However, virulent nationalism, ever-present anti-German sentiments, destructive martyrology mistrust and suspicion of the Other, and antisemitism were laid to rest only temporarily. If the catching-up to Europe was to be successful, Polish demons had to be put on hold. They resurfaced with the right circumstances – *internal* (electoral fatigue with the 8-year long reign of centre Civic Platform, relentless narrative of pitting "us vs them", conspiracy theories along the lines of "institutions work for the elites, not for you", a string of corruption scandals) and *external* (heightened uncertainties associated with the financial and migration crisis; playing off the German card). *The internal* met *the external* and created a perfect breeding ground for the resentment born out of fear, disgust, dissatisfaction, sometimes even boredom. What was needed to square the circle was the supply side. Emotions had to be channeled and expressed. This is where the populist politics of resentment provided much needed clarity and sense of direction. As argued by D. Rodrick, „Populist movements supply the narrative required for political mobilisation around common concerns. They present a story that is meant to resonate with their base, the demand side: here is what is happening, this is why, and these are people who are doing this to you". If one adds to this that the culture of liberal constraints never met broad political consensus about democracy, the demand factors acted as enablers for the populist authoritarianism to take rein and implement the politics of resentment.

A Democracy on the Periphery

While post-1989 politics of, what Paul Blokker aptly called „legal constitutionalism" were dominated by the top-down approach to the institution-building and by ever-present legal formalism that paved the way for 2015, two and half years that had passed since 2015 elections prepared the groundwork for a new regime – *a democracy on the periphery*. A democracy on the periphery responds to, and crowns, *the politics of resentment* understood as a new constitutional doctrine. A peripheral democracy looks up to *the politics of resentment* for guidelines on a new constitutional design built in opposition to a post-1989 world. The ascent of a peripheral democracy marks the end of the post-1989 politics of transformation. The paradigms of peripheral democracy are built around a

different vocabulary from the liberal one that reigned in the post-1989 world. The peripheral democracy is based on six foundational claims and themes: (1) transformation was not only politically, but also morally flawed; (2) that the system as conceived in 1989 with the overarching rationale of rule of law served only the few, while leaving behind the many and, interconnected, (3) institutional design favored the powerful („Wall Street") while disadvantaging the „Main Street"; (4) dominance of the political over the legal; 5) the liberal rule of law is portrayed as allegedly distorting and hiding the bad deeds of the old elites: as a result the rule of law must be rewritten and harnessed to uncover what the bad guys did and help building a new better and virtuous state. Finally and crucially, (6) new system of governance and novel constitutional design are needed, thus the concept of capture of the "bad" state and its corrupt institutions.

The element of *periphery* not only adds important insights into our understanding how a democratic regime is captured. The *periphery* also acts as the enabling and explicatory justification for the capture. As such, *a democracy on the periphery* is an important rupture in the hitherto dominant narrative of the three-step linearity of *democratic transition (democratization) – liberalization – democratic consolidation (Europeanisation)*. Most crucially, a peripheral democracy critically questions the post-1989 assumption of irreversibility of democratic consolidation. The end result is a new state: *a captured state* with a *captive citizenry*. A peripheral democracy is characterized by the lack of engagement and participation by ordinary citizens. At its core, post-communist democracy was superficial and lacking a civic element. People choose not to participate as they never internalised what J. Linz famously called, "democracy as the only game in town", and as such they never learnt the skills necessary to join, and shape the public discourse. For their part, elites were very content with this civic passivity and *désintéressement* as they relished the discretion of building a new democratic state from above. That in turn entailed most dramatic consequences in the form of low trust for the public institutions and weakly embedded public support for these institutions when they came under attack from the illiberal forces.

Crowning the Capture?

Last but not least, *a democracy on periphery* has its own understanding of the constitution. While the liberal democracy presupposes constitutional conflict (within the parameters of a legal system) over the values and vision of a state, a constitution of a peripheral state closes off space for dissent and different voices. *A peripheral democracy* captures liberal democracy both at the level of *values* (only „my values" matter) and *legality* (only "my law and institutions" matter). *A peripheral democracy* is defined by a *constitution of fear*. Fearful resentment is the leitmotif of the constitution-making process, shaped by suspicion, exclusion, with a drive for retribution and settling scores. As such, it reflects the main tenets of populist constitutionalism: distrust in institutions and rejection of the liberal status quo and culture of self-constraint. A constitution of fear is partisan as it only speaks to those whom it accepts as real people and who share the new 'ideals'. A constitution of fear is inward-looking. It protects national uniqueness and is read in direct opposition to the outside and always hostile world that is portrayed as a source of uncertainty at best, and decadence and fear, at worst. A constitution of fear has a new role to play in the peripheral democracy. Instead of protecting the individual against the state, it elevates the community

to the center stage and pushes the individual into the shadow of the state. While liberal constitutions put a premium on conflict management, inclusion, trust among different components of the polity and diversity as a social and normative fact, a constitution of fear thrives on dis-engagement and distrust. It is driven by a revolutionary tradition that builds on the avowed objective of a clean slate and starting from zero and a drive to settle fundamental questions once and for all. A constitution of fear reflects a unified vision of the people and a monolithic state. The people are defined by sameness, not difference. Those who do not fit are dangerous Other(s).

Democracy in Poland: the Only Game in Town?

With the capture almost complete, the Polish counter – revolution slowly draws to a finale. On 5 July 2018, we find ourselves at a critical juncture as we not only bid farewell to the Supreme Court, but first and foremost to three institutional paradigms of post-1989 liberal transition: i). *the separation of* powers; ii). trust in the *transformative power of the law* and *in the institutions* thought to be strong enough to withstand constitutional upheavals, and, iii). belief in the constrained *political power*. One is tempted to ask whether there is a light at the end of the tunnel, after all? The answer is very cautious: Yes, as citizens might finally be ready to leave their comfort zone of passivity (in a state of 40 million not too many cared when the Constitutional Court was demolished in plain sight) and show more interest in what the political is doing allegedly in their name. If this is indeed so, we are only discovering the power of public engagement and togetherness and the value of standing up for the common good.

However, in order to (re)build the Polish rule of law on more solid grounds of public participation and support this time, more permanent and sustained effort will be needed, one that would persist beyond fervent protests of 3-4 July 2018. Let us not forget that this government is ruthlessly smart and cunning. It will wait and weather the storm now, make few concessions here and there, only to get back to its business as usual once the protests wind down and the citizenry goes home. Business as usual this time, though, would ring the death knell for Polish liberal democracy by implementing the final stage of the capture – *a constitution of fear* that lacks even the minimal checks and balances and exposes the citizens to the unlimited power of the omnipotent state.

29 years after the (r)evolution of 1989, we are now coming to realise that the process of democratic learning is much more difficult than initially thought. Faced with the relentless onslaught on the institutions, Polish democracy faces a make-or-break moment. The time has now come to finally start embracing, and defending, the rules of liberal democracy from the grand up as we start to understand that even the strongest institutions must fall when they lack public support. We must never forget that for any democracy to survive, it needs democratic citizens and their sustained concern over the quality of public sphere. Not only must the practices of democracy be learnt, but first of all be experienced and internalised in citizens' hearts to the point that they will truly become the only game in town, warts and all. Do we (citizens, judges, officials at various of levels of government, intellectuals) have what it takes to deliver a *sustained* democratic effort going beyond the here and now?

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